Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1992

The Washington Water Power Company,

Petitioner,

v.

Spokane Indian Tribe,

Respondent.

PETITION FOR WRIT OF CERTIORI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
(Docket No. 91-35000)

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QUESTION PRESENTED

1. Does the final decision in *Washington Water Power Co. v. Federal Energy Regulatory Commission (Respondent) and Spokane Tribe of Indians (Intervenor)*, 775 F.2d 305 (D.C. Cir. (1985) and the federal common-law doctrines of collateral estoppel and res judicata bar or preclude relitigation of the facts and law in the United States District Court relating to the rights, title and interests of The Washington Water Power Company (WWP) under the Act of March 3, 1905 (33 Stat. 1006) to construct, operate, and maintain WWP's Little Falls Power Development located on the Spokane River?

2. Should the unpublished Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit in *Spokane Indian Tribe v. State of Washington, Washington Water Power Company and United States of America* (Docket No. 91-35000), filed on March 12, 1992, be reversed and remanded with instructions to affirm and reinstate the orders of the United States District Court which dismissed the claims of the Spokane Tribe of Indians against WWP?

PARTIES BEFORE THE NINTH CIRCUIT COURT OF APPEALS AND DISTRICT COURT

Petitioner:

The Washington Water Power Company (WWP)* is a corporation organized under the laws of the State of Washington which provides electric and natural gas utility service in the States of California, Idaho, Montana, Oregon and Washington. WWP was an appellee before the United States Court of Appeals for the Ninth Circuit and was a defendant before the United States District Court for the Eastern District of Washington. WWP was the Petitioner in *Washington Water Power Company v. Federal Energy Regulatory Commission (Respondent) and Spokane Tribe of Indians (Intervenor)*, 775 F.2d 305 (D.C. Cir. 1985) (*WWP v. FERC*).

Respondent:

The Respondent is the Spokane Tribe of Indians, which was the appellant before the United States Court of Appeals for the Ninth Circuit and was the plaintiff before the United States District Court for the Eastern District of Washington. The Spokane Tribe of Indians was a fully participating party-intervenor in *WWP v. FERC*.

* WWP has wholly owned subsidiaries, one of which subsidiaries has wholly owned subsidiaries.

Other Parties Below:

The State of Washington was a defendant before the United States District Court for the Eastern District of Washington. The United States of America became a defendant before the United States District Court for the Eastern District of Washington after the district court dismissed the claims against WWP.

Neither the State of Washington nor the United States of America participated in the proceedings before the United States Court of Appeals nor has the State or United States claimed any interest adverse to WWP in the proceedings below.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES BEFORE THE NINTH CIRCUIT COURT OF APPEALS AND DISTRICT COURT ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vii

OPINIONS RENDERED BY OTHER COURTS IN THIS PROCEEDING x

GROUNDS AND JURISDICTION FOR PETITION 1

Opinions To Be Reviewed And Order Extending Time For Petition For Writ of Certiorari 1

Jurisdiction And Grounds For Review By Writ Of Certiorari 2

STATUTES INVOLVED IN THE CASE 4

OPINIONS BELOW 4

STATEMENT OF THE CASE 5

Introduction 5

History of FPC, FERC And D.C. Circuit Court Proceedings . 10

History of the United States District Court for the Eastern District of Washington and Ninth Circuit Court of Appeals Proceedings. 19

REASONS FOR ISSUING WRIT OF CERTIORARI 26

Summary Discussion of Reasons For Issuing Writ of Certiorari 26

The Ninth Circuit Court Of Appeals Should Be Reversed And Remanded With Instructions To Reinstate The Orders Of The District Court Which Dismissed The Claims Of The Spokane Tribe Of Indians Against WWP Based On Collateral Estoppel 30

The Doctrine Of Collateral Estoppel Should Be Applied 33

The Same Issues Were Before The D.C. Circuit Court Of Appeals In *WWP v. FERC* . . 36

Error Was Committed By Ninth Circuit Court Of Appeals . 39

The Ninth Circuit Court Opinion Requires WWP To Relitigate Its Title And Creates A Potential For Conflict Between Court Decisions Between The Same Parties . 43

The Ninth Circuit Court's Memorandum Opinion Wastes Judicial Resources 50

The Ninth Circuit Opinion Is Inconsistent With The D.C. Circuit Opinion 59

CONCLUSION 61

TABLE OF AUTHORITIES

Page(s)

Cases

Supreme Court

Allen v. McCurry, 449 U.S. 90, 66 L.Ed.2d 308, 101 S.Ct. 441 (1980) 31

Blonder-Tongue Labs v. University Foundation, 402 U.S. 313, 28 L.Ed.2d 288, 91 S.Ct. 1434 (1971) 31

Hopkins v. Lee, 19 U.S. (6 Wheat.) 109, 5 Law.Ed. 218 (1821) . . . 30

Montana v. United States, 440 U.S. 147, 59 L.Ed.2d 210, 99 S.Ct. 970 (1979) . 31-33,57, 58,64

Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 3 L.Ed.2d 1345, 78 S.Ct. 1209 (1958) 31, 33-35, 48, 63, 64

United States v. Utah Construction and Mining Co.,384 U.S. 394, 16 L.Ed.2d 642, 86 S.Ct. 1545 (1966) 31

University of Tennessee v. Elliott, 478 U.S. 788, 92 L.Ed.2d 635, 106 S.Ct 3220 (1986) 31

Other Federal

Montana Power Company v. Federal Power Commission, 185 F.2d 491 (D.C. Cir. 1950) 60,61

State of Washington Department of Game v. Federal Power Commission, 207 F.2d 391 (9th Cir. 1953) 34

United States v. Big Bend Transit Co., 42 F.Supp. 459 (E.D. Wash. 1941) 43,44,54, 55,62

Washington Water Power Company v. Federal Energy Regulatory Commission, 775 F.2d 305 (D.C. Cir. 1985) . . . . . *[passim]*

Statutes

Federal

Federal Power Act
Section 23(a) [16 USC § 816] . 4,16,36
Section 23(b) [16 USC § 817]. 4,16,36, 46, 60
Section 306 [16 USC § 825e] 46
Section 307(a) [16 U.S.C. § 825f(a)] 46
Section 313(b) [16 U.S.C. § 825 l] 18,34
28 USCA § 1254(1) (Supp. 1992) 2

Act of March 2, 1899, Section 3 (30 Stat. 990) 4
Act of March 3, 1905 (33 Stat. 1006) . . . i, 4, 12, 13, 41, 43, 54
28 U.S.C. § 1331 3
28 U.S.C. § 1362 3

State

RCW 80.12.020 (1991) 52

Other Authorities

Article III of the United States Constitution 3

Supreme Court Rule 10.1(a) 3

The Washington Water Power Company, Project No. 2545, FERC Opinion No. 117, 15 FERC ¶ 61,039, pp. 61,064 *et seq.* (1981) . . . 5,10,15

The Washington Water Power Company, Project No. 2545-007, FERC Opinion No. 117-A, 25 FERC ¶ 61,002, pp. 61,001 *et seq.* (1983) 5,10,17

Washington Water Power Company, Project No. 2545, 11 FERC ¶ 63,001, pp. 65,001 *et seq.* (1980) 5,11,14

OPINIONS RENDERED BY OTHER COURTS IN THIS PROCEEDING

The unpublished Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit filed on March 12, 1992, is set forth in the Appendix at page 4a, *et seq.* The Order Denying The Washington Water Power Company's Petition for Rehearing was entered on May 28, 1992, and is set forth at Appendix 2a. The opinion of the United States District Court for the Eastern District of Washington entitled, "Order Re: WWP and Litigation Schedule" entered on February 8, 1990 is set forth at Appendix 16a. The District Court's Order Denying Motion for Reconsideration is set for at Appendix 26a.

NO. _____

IN THE
UNITED STATES SUPREME COURT

The Washington Water Power Company,
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PETITION FOR WRIT OF CERTIORARI

GROUNDS AND JURISDICTION FOR PETITION

Opinions To Be Reviewed And Order Extending Time For Petition For Writ of Certiorari.

The Washington Water Power Company (WWP) petitions this Supreme Court of the United States for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review the unpublished

Memorandum Opinion in *Spokane Tribe of Indians v. State of Washington, Washington Water Power Co., and the United States of America*, dated March 12, 1992. (Appendix p. 4a). On May 28, 1992, the Ninth Circuit Court of Appeals denied WWP's Petition for Rehearing. (Appendix p. 2a). On August 14, 1992, Supreme Court Justice O'Connor granted an extension of time to WWP (to September 25, 1992) within which to file a petition for a writ of certiorari. (Appendix p. 1a).

Jurisdiction And Grounds For Review By Writ Of Certiorari.

This Supreme Court of the United State has jurisdiction to issue a Writ of Certiorari pursuant to 28 USCA § 1254(1) (Supp. 1992) to review the Memorandum Opinion of the Ninth Circuit Court of Appeals issued in *Spokane Indian Tribe v. State of Washington; Washington Water Power Company; and United States of*

America, in Docket No. 91-35000 filed on March 12, 1992.[1] This court has the judicial power to review the application of federal common-law of The Ninth Circuit Court of Appeals under Article III of the United States Constitution.

WWP asserts that under Supreme Court Rule 10.1(a) this Court should assert its power and authority to issue a Writ of Certiorari for the following reasons:

(a) The Memorandum Opinion of the Ninth Circuit Court of Appeals is in conflict with the decision of the D.C. Circuit Court of Appeals in *Washington Water Power v. Federal Energy Regulatory Commission and Spokane Tribe of Indians*, 775 F.2d 305 (D.C. Cir. 1985); and

(b) The Ninth Circuit Court of Appeals has so far departed from the accepted and usual course of federal

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[1] Federal jurisdiction in the first instance was based on 28 U.S.C. §§ 1331 and 1362.

judicial proceedings by requiring WWP to relitigate facts and law which were previously litigated between these same parties in prior proceedings in another federal court.

STATUTES INVOLVED IN THE CASE

The particular statutes of significance involved in this case include:

1. Act of March 3, 1905 (33 Stat. 1006), Appendix at p. iiia;
2. Section 23 of the Federal Power Act (16 USCA § 816 and 16 USCA § 817) Appendix at p. xia and xiia.

OPINIONS BELOW

The memorandum decision of the Court of Appeals for the Ninth Circuit has not been reported, but it is reprinted in the Appendix, p. 4a. The Order Re: WWP and Litigation Schedule entered in the United States District Court for the Eastern

District of Washington (Alan A. McDonald) has not been reported. It is reprinted in the Appendix, p. 16a. The Order Denying Motion for Reconsideration entered in the United States District Court is set forth at Appendix, p. 26a.

STATEMENT OF THE CASE

Introduction.

This is the seventh occasion in the last 21 years when WWP has been required to appear before an adjudicatory forum to defend its property rights against claims by the Spokane Tribe of Indians in connection with the Little Falls Power Development.[2]

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[2] *See Washington Water Power Company, Project No. 2545,* 11 FERC ¶ 63,001, pp. 65,001 *et seq.* (1980) [Appendix, p. 345a]; *The Washington Water Power Company, Project No. 2545,* FERC Opinion No. 117, 15 FERC ¶ 61,039, pp. 61,064 *et seq.* (1981) [Appendix, p. 417a]; *The Washington Water Power Company, Project No. 2545-007,* FERC Opinion No. 117-A, 25 FERC ¶ 61,002, pp. 61,001 *et seq.* (1983) [Appendix, p. 480a]; *Washington Water Power Company v. Federal Energy Regulatory Commission,*

(continued...)

After 14 years before the Federal Power Commission (FPC)[3], the Federal Energy Regulatory Commission (FERC) and the United States Court of Appeals, District of Columbia Circuit, a final decision was entered in *Washington Water Power Company v. Federal Energy Regulatory Commission*, 775 F.2d 305 (D.C. Cir. 1985) (hereinafter *WWP v. FERC*). In that case, the Court held that The Washington Water Power Company (WWP) "now owns the rights,

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[2](...continued)
775 F.2d 305 (D.C. Cir. 1985) [Appendix, p. 594a]; the orders of the United States District Court for the Eastern District of Washington dismissing the Tribe's complaint against WWP as being barred by collateral estoppel based upon *WWP v. FERC*, (1992) [Appendix p. 16a and p. 26a]; and the Memorandum Opinion of the Ninth Circuit Court of Appeals in *Spokane Indian Tribe v. State of Washington, et al*, by which the Ninth Circuit Court reversed the judgment of the United States District Court (1992) [Appendix p. 4a]. WWP petitions to have the vexatious litigation terminated against it on the basis that further litigation is barred by the doctrine of collateral estoppel and related doctrines of preclusion.

[3] In 1971, The Spokane Tribe of Indians filed a petition to intervene before the FPC, alleging ownership of rights and a claim of damages. A copy of the Tribe's Petition to Intervene is set forth at Appendix, p.309a.

title, interest, authority and right-of-way necessary for the construction, operation and maintenance of the Little Falls Power Development... ." *Id.* at 336. At all times relevant thereto, the Spokane Tribe of Indians was a full fledged party and intervenor and litigant before the FPC, FERC, and the D.C. Circuit Court. Those proceedings were commenced, advocated, supported, and provoked by the Tribe.[4]

During the FERC proceedings, the Tribe commenced a separate action before the United States District Court for the Eastern District of Washington in 1982, making the same claims and seeking the same relief that was sought before the FPC and FERC.[5] WWP moved for summary judgment

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[4] *See* The Tribe's petition filed with the FPC in 1971 (Appendix p. 309a).

[5] *See* The Tribe's Complaint in the United States District Court for the Eastern District of Washington, Appendix 68a.

of dismissal of the complaint in 1989 based upon the decision of the D.C. Circuit Court in WWP v. FERC.[6] The District Court dismissed all claims of the Tribe based upon the doctrines of collateral estoppel and issue preclusion.[7]

In an unpublished Memorandum Opinion, the Ninth Circuit Court of Appeals reversed the district court and remanded, concluding that the decision of the D.C. Circuit Court of Appeals did not bar the Tribe from claiming title to WWP's Little Falls Power Development property.[8]

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[6] *See* WWP's Supplemental and Second Amended Answer (Appendix 94a), WWP's Motion for Summary Judgment (Appendix 16a), WWP's Statements of Fact (Appendix 26a and 304a), WWP's Memorandum of Authorities (Appendix 282a), and the Affidavits of Jerry K. Boyd (Appendix 119a, 125a, 137a and 140a. In order to reduce the volume of the Appendix, WWP has not included all of the affidavit exhibits in the Appendix; however, some of the exhibits are included in the Appendix as separate documents.

[7] *See* the district court opinion at Appendix pp. 16a and 26a.

[8] *See* Memorandum Opinion, Appendix at p. 4a.

The decision of the Ninth Circuit Court of Appeals exposes WWP to the possibility that a decision may be rendered in the United States District Court and the Ninth Circuit Court of Appeals (on appeal) that will be inconsistent with and in conflict with the decision of the D.C. Circuit Court of Appeals in *WWP v. FERC*. Only the application of the doctrine of collateral estoppel or issue preclusion will bar or avoid requiring WWP to twice litigate its property rights in two different forums with the possibility of two different results.

To show the injustice and inequity of such a result, the factual and procedural background of the two litigation tracks are set forth below. Those litigation tracks are:

(1) The litigation before the FPC, FERC, and finally the United States Court

of Appeals for the District of Columbia Circuit; and

(2) The United States District Court for the Eastern District of Washington and the Ninth Circuit Court of Appeals.

History of FPC, FERC And D.C. Circuit Court Proceedings.

The history of the prior litigation and the decisions rendered in the prior litigation are described and set forth in *Washington Water Power Co. v. Federal Energy Regulatory Commission and Spokane Tribe of Indians*, intervenor, 775 F.2d 305 (D.C. Cir. 1985) (Appendix at p. 594a); The Washington Water Power Company, Project No. 2545-007, FERC Opinion No. 117-A, 25 FERC ¶ 61,002, pp. 61,001-61,030 (1983) (Appendix at p. 480a); The Washington Water Power Company, Project No. 2545, FERC Opinion No. 117, 15 FERC ¶ 61,039, pp. 61,064-61,080 (1981) (Appendix at p. 417a); and Washington

Water Power Company, Project No. 2545, 11 FERC ¶ 63,001, pp. 65,001-65,013 (1980) (Appendix at p. 345). A history of the prior litigation is also discussed in the Affidavits of Jerry K. Boyd set forth at Appendix, pp. 119a, 125a, 137a and 140a, which affidavits were filed with the United States District Court for the Eastern District of Washington.

In the FPC/FERC proceedings, the Tribe intervened and claimed that WWP did not acquire the property rights that were necessary for the construction, operation and maintenance of the Little Falls Power Development and therefore WWP should be required to obtain a license from the Federal Power Commission (later the Federal Energy Regulatory Commission) pursuant to the Federal Power Act.[9] The Tribe and the Secretary of the Interior

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[9] *See* Tribe's Petition to Intervene filed with the FERC in 1971, Appendix at p. 309a.

claimed: (1) the Tribe, or the United States on behalf of the Tribe, owns the land where WWP's Little Falls hydroelectric development is located; (2) the Little Falls hydroelectric development blocked and interfered with fishing rights of the Tribe and therefore the Tribe was damaged and was entitled to compensation; and (3) that WWP did not pay fair compensation for the land it acquired.[10]

In the FPC/FERC proceeding WWP made the following claims: (1) WWP acquired all of the rights, title and interest in land and water for the Little Falls Power Development pursuant to the Act of March 3, 1905, which rights were acquired prior to June 10, 1920 and therefore Little Falls is exempt from licensing under Section 23 of the Federal Power Act; (2) WWP fully compensated the United States

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[10] *Id.*

and the Tribe for its Little Falls rights pursuant to the 1905 Act; and (3) the Tribe has no claim for any damages with respect to any claimed fishing rights since WWP fully complied with the applicable law.[11] The Tribe and the staff of the FERC opposed WWP's claim of exemption and argued that WWP did not have all of the rights, title and interest necessary for the construction, operation and maintenance of Little Falls and that therefore WWP was required to obtain a license under the Federal Power Act.[12]

WWP moved for dismissal of FERC proceeding on the basis that FERC had no jurisdiction over WWP's Little Falls property rights. The Tribe, Interior, and

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[11] *See* the issue adjudicated in *WWP v. FERC, supra*. [Appendix at p. 594a].

[12] *See* the Affidavit of Jerry K. Boyd dated October 6, 1989 for a description of the Tribe's contentions before the FERC (Appendix at p. 125a) at 126a-127a, and the Tribe's Petition In Intervention before the FPC (Appendix at 309a).

FERC Staff opposed WWP's motion and supported FERC jurisdiction. FERC retained jurisdiction and determined whether or not WWP had acquired all of the rights necessary for the construction, operation and maintenance of Little Falls prior to June 10, 1920.[13]

Extensive hearings were held and more than 150 exhibits were admitted in an administrative proceeding before an FERC Administrative Law Judge (ALJ). After hearings and briefings and consideration of the evidence, the ALJ ruled that WWP did not have all of the rights necessary for the construction, operation and maintenance of the Little Falls Power Development. Washington Water Power Company, Project No. 2545, 11 FERC ¶ 63,000, p. 65,001, pp. 65,011-012 (1980). A review of the ALJ decision shows

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[13] *See* the FERC orders (Appendix 345a at 406a-407a; 417a at 465a; and 480a at 566a-567a).

that the parties had a full and fair adversarial proceeding in which the validity and nature of WWP's rights, title and interest were at issue with respect to Little Falls.

On review, the FERC affirmed, with modifications, the Initial Decision of the ALJ. FERC Opinion No. 117; Opinion and Order Affirming, With Modifications, the Initial Decision on Jurisdiction; The Washington Water Power Company, Project No. 2545, 15 FERC ¶ 61,039, pp. 61,064 *et seq.* (1981). (Appendix at p. 417a) As FERC Opinion No. 117 shows, the Spokane Indian Tribe, the Secretary of the Interior, and the Staff, FERC participated in the FERC proceedings. 15 FERC at p. 61,065 (Appendix at 417a). (For an example of the extent to which the Tribe participated, *see* 15 FERC at p. 61,069 [Appendix at 436a-438a].) A review of FERC Opinion No. 117 shows that the parties

fully litigated WWP's property rights and that the FERC fully considered the available evidence and record with respect to the nature, extent and effect of WWP's Little Falls property rights, title and interest. (*E.g.*, *see* Appendix 436a-441a)

It is shown that FERC's determinations of title were deemed necessary as part of the FERC's function in determining whether or not the Little Falls Power Development was exempt from licensing under Section 23[14] of the Federal Power Act.[15] Ultimately, the FERC determined WWP's property rights, title and interest with respect to Little Falls and further determined that such rights, title and interest were not sufficient to

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[14] Sections 23(a) [16 USC § 816] and 23(b) [16 USC § 817] of the Federal Power Act as they existed in 1985 are set forth in the Appendix at pp. xia and xiia.

[15] FERC actually determined WWP's title to land (Appendix at 420a and 439a)

exempt WWP from licensing Little Falls under Section 23 of the Federal Power Act. 15 FERC at pp. 61,073-61,076.

WWP sought rehearing of FERC Opinion No. 117. After further consideration of the record, the FERC issued FERC Opinion No. 117-A, The Washington Water Power Company, Project No. 2545-007, 25 FERC ¶ 61,002, pp. 61,001 *et seq.* (1983). Again, the FERC reviewed the record before it, considered the arguments of counsel for all of the parties, including the Tribe, and made various determinations with respect to WWP's property rights, title and interests and the legal foundation of those rights, title and interests. The extent to which the FERC examined and considered WWP's property interests in order to find some defect in title which would be sufficient for FERC to exercise jurisdiction is discussed in the dissenting opinion of FERC Chairman

Butler, 25 FERC at p. 61,027. (Appendix at p. 582a)

Finally, on judicial review of the FERC decisions pursuant to 16 USCA § 8251, WWP prevailed before the United States Court of Appeals for the District of Columbia Circuit. *WWP v. FERC*. In that case, the D.C. Circuit Court reviewed the transcript of the hearings and all 159 exhibits relating to WWP's title to the Little Falls property. After reviewing the extensive record established before the FERC relating to WWP's rights, title and interest, the D.C. Circuit Court concluded that WWP "now owns the rights, title, interests, authority and right-of-way necessary for the construction, operation and maintenance of the Little Falls Power Development... ." *WWP v. FERC*, *supra* at 336. (Appendix at p. 729a) This decision and conclusion was reached as a matter of law based upon the entire record before

the FERC. A review of the decision in *WWP v. FERC,* including the dissent, shows that if WWP did not own all of the rights, title, interests, authority and right-of-way necessary for the construction, operation and maintenance of the Little Falls Power Development, WWP would have been required to license the Little Falls Power Development under the Federal Power Act.

History of the United States District Court for the Eastern District of Washington and Ninth Circuit Court of Appeals Proceedings.

In 1982, the Spokane Tribe of Indians filed a complaint in the United States District for the Eastern District of Washington seeking damages and title to the land occupied by WWP's Little Falls Power Development.[16] The Tribe claimed

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[16] Appendix at p. 68a.

that WWP did not have all of the rights, title, interest and property necessary for the construction, operation and maintenance of the Little Falls power project and that therefore WWP owed the Tribe money damages. After *WWP v. FERC* was decided by the D.C. Circuit Court, WWP moved for dismissal of the Tribe's complaints based upon the doctrine of collateral estoppel and issue preclusion.[17] In support of such motion, WWP presented nearly the entire FERC record to the District Court, including the Tribe's Petition to Intervene before the FPC and copies of many of the exhibits that were before the FERC through the affidavits of Jerry K. Boyd, WWP's attorney, before the FERC and the D.C. Circuit Court.[18] All of the Exhibits

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[17] Appendix at p. 116a.

[18] Appendix at p. 119a, 125a, 137a and 140a.

attached to the affidavits are not included in the Appendix to this Petition due to the volume and nature of the exhibits. However, the affidavits and the exhibits were before the Ninth Circuit Court of Appeals in the form of Supplemental Excerpts of Record.[19]

The uncontested facts before the United States District Court included: (1) the Tribe had commenced and prosecuted the action before the FPC and FERC; (2) the Tribe was a full-fledged party and had a full and fair opportunity to litigate all of the relevant facts relating to WWP's rights, title and interest for the Little Falls Power Development before the FPC, FERC, and the D.C. Circuit Court; (3) the Tribe's

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[19] The indices to the Supplemental Excerpts of Record in the Ninth Circuit Court of Appeals are included in the Appendix to this Petition at p. 260a and p. 264a. The entire Supplemental Excerpt of Records before the Ninth Circuit Court has not been reproduced in the Appendix to this Petition due to the volume of the documents.

attorneys before the FPC, FERC, and D.C. Circuit Court were the same attorneys that appeared on behalf of the Tribe before the United States District Court; (4) the allegations made with respect to WWP's property rights and for damages were the same before the FPC, FERC and D.C. Circuit Court as the claims that were made before the U.S. District Court; and (5) WWP had incurred substantial costs in litigating its rights, title and interest for the Little Falls Power Development before the FPC, FERC and D.C. Circuit Court and that it would be unfair and unjust to require WWP to relitigate its rights, title and interest.

After reviewing the entire record before it, the United States District Court for the Eastern District of Washington (the Hon. Alan A. McDonald) concluded that the facts and issues that were before the FPC, FERC and D.C. Circuit

Court were the same facts and issues that were before the United States District Court and that such issues had been fully litigated in the FPC, FERC and D.C. Circuit Court of Appeals as shown in *WWP v. FERC*. Therefore, the United States District Court concluded that the Tribe's claims before the District Court were barred by the application of the doctrines of collateral estoppel and issue preclusion and that the Tribe's complaint against WWP would be dismissed.[20]

On appeal, the Ninth Circuit Court of Appeal issued an unpublished Memorandum Opinion concluding that the United States Court of Appeals for the D.C. Circuit "did not address the Tribe's claimed ownership interests in the disputed property." (Memorandum Opinion at p. 4, Appendix at

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[20] The District Court's Order Re: WWP and Litigation Schedule and Order Denying Motion for Reconsideration are set forth in Appendix at p. 16a and 26a.

p. 9a). The Ninth Circuit Court further stated that "the ownership issue could be resolved in the Tribe's favor without creating an inconsistency with *Washington Power*, the Tribe is not collaterally estopped from asserting its ownership claim." (Memorandum Opinion at p. 5, Appendix at p. 11a). In its Memorandum Opinion, the Ninth Circuit failed to consider that the Tribe had challenged WWP's property rights, title and interest and that the D.C. Circuit Court had, of necessity, determined WWP's rights, title and interest necessary for the construction, operation and maintenance of the Little Falls Power Development. The Ninth Circuit Court failed to recognize that since WWP's construction, operation and maintenance of the Little Falls Power Development was determined by the D.C. Circuit Court to be lawful under acts of Congress and that all of the compensation

required by Congress had been paid. Finally, the Memorandum Opinion of the Ninth Circuit does not expressly recognize that the opinion of the D.C. Circuit Court of Appeals in *WWP v. FERC* has any binding effect whatever upon the Spokane Indian Tribe.

The final insult in the opinion of the Ninth Circuit Court of Appeals was made in the Ninth Circuit's Memorandum Opinion when it stated "the only issue ever litigated during those [*WWP v. FERC*] proceedings was whether WWPC had an interest, any interest, that would trigger the licensing exception in the Federal Power Act." (Memorandum Opinion at p. 6, Appendix at p. 13a). Apparently, the Ninth Circuit Court concluded that all WWP had to show in the FPC, FERC and D.C. Circuit Court proceedings is that WWP had some colorable claim to title to a "right-of-way." This, of course, is refuted by the

careful analysis that was made in *WWP v. FERC* by the D.C. Circuit Court of Appeals, which will be discussed below.

REASONS FOR ISSUING WRIT OF CERTIORARI

Summary Discussion of Reasons For Issuing Writ of Certiorari.

The Memorandum Opinion of the Ninth Circuit Court of Appeals exposes WWP to multiple and vexatious litigation over WWP's rights, title and interests necessary for the construction, operation and maintenance of the Little Falls Power Development. The Ninth Circuit Court's Memorandum Opinion allows a possible conflict between the decision of the United States District Court for the Eastern District of Washington and the final decision of the United States Court of Appeals for the District of Columbia Circuit.

WWP was put through extensive and costly litigation of WWP's rights, title and interest to its Little Falls Power Development property before the FPC, the FERC and the District of Columbia Circuit Court of Appeals, that litigation was requested by the Spokane Tribe of Indians and in which litigation the Tribe participated as a full-fledged party with full and complete rights to offer testimony and exhibits and a full and complete right to brief and argue. The outcome of that litigation is a final binding decision of the United States Court of Appeals for the District of Columbia Circuit, *WWP v. FERC,* 775 F.2d 305 (D.C. Cir. 1985), which decision was issued approximately 14 years after the Tribe commenced its action before the FPC contesting WWP's property rights. That final binding decision included the following determinations:

(1) WWP currently holds "a limited fee with implied reverter for non-use" to the Little Falls power project property. *Id.* at 325. (Appendix at 679a)

(2) "The Washington Water Power Company by appropriation acquired the water rights and the lawful right-of-way for the construction of a dam to divert, store and beneficially use the subject waters of the Spokane River and now owns the rights, title, interest, authority and right-of-way necessary for the construction, operation and maintenance of the Little Falls Power Development... ." *Id.* at 336.

Based upon the FPC and FERC record, (much of which was also presented to the District Court Judge below, and based upon the decision in *WWP v. FERC*, the District Court below concluded that WWP is entitled to dismissal of all of the Tribe's claims for damages based on a claim that WWP had

unlawfully constructed, operated and maintained the Little Falls Power Development. The Ninth Circuit Court of Appeals reversed that decision and remanded the matter for further proceedings, thus requiring WWP to relitigate its property rights, title and interest with respect to the Little Falls Power Development. WWP is gravely concerned that such relitigation could result in a conclusion that WWP does not have "a limited fee with implied reverter or non-use" to the Little Falls Power Development property or that WWP does not now own "the rights, title, interest, authority and right-of-way necessary for the construction, operation and maintenance of the Little Falls Power Development." Such a result would be in direct conflict with the decision of the D.C. Circuit Court of Appeals. Therefore,

the Writ of Certiorari should be granted to avoid such a conflict.

The Ninth Circuit Court Of Appeals Should Be Reversed And Remanded With Instructions To Reinstate The Orders Of The District Court Which Dismissed The Claims Of The Spokane Tribe Of Indians Against WWP Based On Collateral Estoppel.

Since 1821, this Court has generally held that when a matter has been contested between the same parties in any other court, the decision of that court "puts an end to all further controversy concerning the points thus decided between the parties in such suit." *Hopkins v. Lee*, 19 U.S. (6 Wheat.) 109, 113, 5 Law.Ed. 218, 219 (1821). In 1979, this Court concluded that:

> A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a 'right, question or fact distinctly put in issue and directly determined by a court of competent

> jurisdiction ... cannot be disputed in a subsequent suit between the same parties or their privies ... .' *Southern Pacific R. Co. v. United States,* 168 U.S. 1, 48-49, 42 L.Ed. 355, 18 S.Ct. 18 (1897)."

Montana v. United States, 440 U.S. 147, 153, 59 L.Ed.2d 210, 216, 99 S.Ct. 970 (1979). *See, also University of Tennessee v. Elliott,* 478 U.S. 788, 92 L.Ed.2d 635, 106 S.Ct 3220 (1986); *Allen v. McCurry,* 449 U.S. 90, 66 L.Ed.2d 308, 101 S.Ct. 441 (1980); *Blonder-Tongue Labs v. University Foundation,* 401 U.S. 532, 28 L.Ed.2d 288, 91 S.Ct. 1017 (1971); *United States v. Utah Construction and Mining Co.,* 384 U.S. 394, 421, 16 L.Ed.2d 642, 86 S.Ct. 1545 (1966); and *Tacoma v. Taxpayers of Tacoma,* 357 U.S. 320, 2 L.Ed.2d 1345, 78 S.Ct. 1209 (1958). The determinations of issues and rights which are actually and necessarily determined by a court of competent jurisdiction is conclusive in subsequent suits based on a different

cause of action involving a party to the prior litigation. *Id.* In *Montana*, the court went on to state the application of the doctrine of collateral estoppel procedures:

> parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries [here WWP] from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

Supra at 153-154.

WWP files this Petition for Writ of Certiorari in order to avoid "the expense and vexation attending multiple lawsuits" and to avoid "the possibility of inconsistent decisions", which is at the heart of the doctrines of res judicata and collateral estoppel.

The Doctrine Of Collateral Estoppel Should Be Applied.

Certainly the doctrine of collateral estoppel should be applied where an issue is actually and necessarily determined by a court of competent jurisdiction. *Montana v. United States, supra* at 153. Also, the preclusive effect of decisions made by the Federal Power Commission and the Ninth Circuit Court of Appeals reviewing a decision of the Federal Power Commission was discussed by this Court in *Tacoma v. Taxpayers of Tacoma, supra*. There, when the State of Washington attempted to circumvent the effect of an FPC and Ninth Circuit Court decision by filing a separate action in a state court. In *Tacoma*, this Court concluded that the FPC (now the FERC) had the authority to decide all issues inhering in the controversy, and that the sole and exclusive remedy of the parties is to seek judicial review

pursuant to Federal Power Act, Section 313(b) [16 U.S.C. § 8251]. The *Tacoma* court concluded that the decision of the FPC and the United States Court of Appeals on judicial review is final and binding on all issues inhering in the controversy between the parties. *Id.* at 336.

It is noteworthy that in *Tacoma*, this Supreme Court reviewed the decision in *State of Washington Department of Game v. Federal Power Commission,* 207 F.2d 391 (9th Cir. 1953), and concluded that the statements made in the Ninth Circuit Court's decision showed that the very issue that was presented in *Tacoma v. Taxpayers of Tacoma* had been litigated in the Court of Appeals and had been decided by its judgment. *Id.* at 339. This Court went on to state in *Tacoma*:

> But even if it might be thought that this issue was not raised in the Court of Appeals, it cannot be doubted that it could and should have been, for that

> was the court to which Congress had given "exclusive jurisdiction to affirm, modify, or set aside" the Commission's order. And the State may not preserve the point, for another round of piecemeal litigation, by remaining silent on the issue while its action to review and reverse the Commission's order was pending in that court... ."

Id.

In this case before this Court, the issue is substantially the same as the issue that was before this Court in *Tacoma*. The only difference is that instead of the legal issues and the facts being decided correctly by the FPC, in this case, the issues were decided by the United States Court of Appeals for the District of Columbia Circuit as a matter of law. A review of *WWP v. FERC* shows that WWP's property rights were determined.

The Same Issues Were Before The D.C. Circuit Court Of Appeals In *WWP v. FERC*.

The issues that were litigated before the FPC, FERC and the D.C. Circuit Court are apparent from the Tribe's Petition to Intervene before the FPC (Appendix at p. 309a) and the Opinions of the FERC and the D.C. Circuit Court of Appeals. (Appendix at pp. 342a, 345a and 417a. At all phases of the FPC, FERC and D.C. Circuit Court litigation, the Tribe claimed that WWP was required to obtain a license from the FERC under the Federal Power Act because WWP did not own all of the rights, title and interest necessary for the construction, operation and maintenance of the Little Falls Power Development. WWP's only defense to such claim is that the Little Falls Power Development was exempt from licensing under Section 23 of the Federal Power Act [16 U.S.C. § 816 and 16 U.S.C. § 817] on the basis that WWP had acquired

all of the rights, title and interest necessary for the construction, operation and maintenance of the Little Falls Power Development, prior to June 10, 1920.

By presenting irrefutable documentary evidence, WWP was able to establish, as a matter of law, that WWP currently holds "a limited fee with implied reverter for non-use"[21] and that WWP "now owns the rights, title, interest, authority and right-of-way necessary for the construction, operation and maintenance of the Little Falls Power Development."[22] The D.C. Circuit Court reached this conclusion after extensively reviewing all of the documentary evidence presented by all of the parties, including the Tribe, relating to the Tribe's claim of ownership of the subject property and WWP's ownership of

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[21] *WWP v. FERC*, 775 F.2d at 325 (Appendix at p. 679a).

[22] *Id.* at 336, Appendix at p. 729a.

the subject property. There can be no doubt that it was necessary for the Court of Appeals to consider and determine the Tribe's and WWP's ownership interests in the Little Falls Power Development property and WWP's rights to construct, operate and maintain the Little Falls Power Development in order to determine whether or not the Little Falls Power Development was exempt from licensing under the Federal Power Act. All of the factual and legal issues relating to WWP's rights with respect to the Little Falls Power Development were squarely presented to the FPC, FERC and D.C. Circuit Court of Appeals and were decided, with certainty and finality, by the D.C. Circuit Court of Appeals in *WWP v. FERC*.

All of the circumstances giving rise to the D.C. Circuit Court of Appeals' Opinion in *WWP v. FERC* were squarely presented to the United States District

Court for the Eastern District of Washington and to the United States Court of Appeals for the Ninth Circuit.[23] The District Court for the Eastern District of Washington carefully reviewed *WWP v. FERC* and the record that was before the D.C. Circuit Court of Appeals and unequivocally concluded that the Tribe was and should be precluded from requiring WWP to relitigate its rights, title and interests as they relate to the Little Falls Power Development. (Appendix at 16a and 26a.)

Error Was Committed By Ninth Circuit Court Of Appeals.

The Ninth Circuit Court of Appeals construed the law being applied by the D.C. Circuit Court of Appeals in *WWP v. FERC* very narrowly and then construed the opinion in *WWP v. FERC* even more narrowly.

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[23] *See* the Affidavits of Jerry K. Boyd, Appendix at pp. 114a, 125a, 137a and 140a.

Ninth Circuit Memorandum Opinion (Appendix at pp. 9a-11a). The Ninth Circuit Court stated that *WWP v. FERC* "merely determined that WWPC was not subject to the licensing requirements of the Federal Power Act, and did not decide whether the Tribe held an ownership interest in the disputed property." (Memorandum Decision, Appendix at p. 9a). The Ninth Circuit Court ignored the underlying determinations that were made in *WWP v. FERC* that were necessary before the D.C. Circuit Court could conclude that the Little Falls Power Development was not subject to the licensing requirements of the Federal Power Act. The Ninth Circuit Court ignored the exhaustive litigation required of WWP to preserve its property rights from a licensing requirement and the fact that WWP was required to, and did prove, as a matter of law, that WWP owned all of the rights, title and interest necessary for

the construction, operation and maintenance of the Little Falls Power Development. The Ninth Circuit Court of Appeals ignored the fact that the D.C. Circuit Court had rejected the Tribe's claim to the Little Falls Power Development property and had firmly held that WWP owned such property and it is the ownership of such property rights by WWP that allowed WWP to be exempt from licensing the Little Falls Power Development. *WWP v. FERC, supra* at 336 (Appendix, p. 729a-730a). Such determination of WWP ownership of property by the D.C. Circuit Court and determination that WWP's construction, operation and maintenance of the Little Falls Power Development was authorized and lawful under the Act of March 3, 1905, necessarily precludes a later claim by the Tribe that such construction, operation

and maintenance of the Little Falls Power Development is unlawful.

The Ninth Circuit Court of Appeals' Memorandum Opinion ignores the other issues that were decided by the United States District Court for the Eastern District of Washington. Those other issues include the District Court's decision that the Tribe's claims for damages in connection with WWP construction, operation and maintenance of the Little Falls Power Development was precluded by the decision in *WWP v. FERC*. The Ninth Circuit Court seems to have focused only on WWP's "precise" title.[24] Again, the Ninth Circuit Court of Appeals ignored the express language contained in *WWP v. FERC* which states that WWP holds "a limited fee

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[24] The Ninth Circuit Court stated that *WWP v. FERC* "does not involve a judicial determination of WWPC's precise property interest in the land under the Little Falls Dam." (Emphasis added.) (Memorandum Opinion at p. 4, Appendix at p. 9a).

with implied reverter for non-use" citing *United States v. Big Bend Transit Co.*, 42 F.Supp. 459 (E.D. Wash. 1941). For a more complete discussion of the nature of WWP's property rights, *see WWP v. FERC* and *United States v. Big Bend Transit Co., supra*. The principal distinctions between WWP's Little Falls Power Development and the Big Bend Transit Co. project is that WWP actually constructed its project in reliance upon the rights that it acquired from the Secretary of the Interior pursuant to the Act of March 3, 1905.

The Ninth Circuit Court Opinion Requires WWP To Relitigate Its Title And Creates A Potential For Conflict Between Court Decisions Between The Same Parties.

The Ninth Circuit Court Memorandum Opinion reversed and remanded the decision of the United States District Court to require that the Spokane Tribe of Indians and WWP relitigate WWP's rights, title and

interest to the Little Falls Power Development. What will be the result of such litigation? In the United States District Court below, substantially all of the evidence that was presented to FERC and was before the D.C. Circuit Court in *WWP v. FERC* will once again be presented to the United States District Court.[25] The United States District Court will then be required to review the law that was extensively analyzed in *WWP v. FERC* and *Big Bend Transit Co.* and will be required to review the evidence that was also discussed in *WWP v. FERC*. Then the United States District Court will be required to make findings and reach a conclusion of law.

WWP presumes that the conclusion of law will be the same as that reached in

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[25] Affidavit of Jerry K. Boyd, Appendix p. 125a at 129a. *See generally* the Affidavits of Jerry K. Boyd, Appendix pp. 119a, 125a, 137a and 140a.

WWP v. FERC. However, as in any litigation, it is possible that the United States District Court may reach a different conclusion. If the United States District Court reaches the conclusion that WWP does not have all of the rights, title and interest necessary for the construction, operation and maintenance of the Little Falls Power Development, then it is apparent that according to the United States District Court, the decision of the D.C. Circuit Court in *WWP v. FERC* is in error. The absurdity of such result is that, in essence, the United States District Court will have been put in a position of reviewing, and possibly overruling, a decision of the United States Court of Appeals for the District of Columbia Circuit.

Again, assuming, *arguendo*, that the United States District Court reaches a different conclusion than the D.C. Circuit

Court in *WWP v. FERC*, will the Spokane Tribe of Indians, the Secretary of the Interior, or the Staff of the FERC then file a complaint with the FERC contending that WWP has unlawfully constructed, operated and maintained the Little Falls Power Development in violation of Section 23(b) of the Federal Power Act [16 U.S.C. § 817] and Section 306 of the Federal Power Act [16 U.S.C. § 825e] authorizes any person to file a complaint against any public utility, which would include WWP, and allege that WWP is violating the Federal Power Act in its continued operation and use of the Little Falls Power Development. The FERC may investigate any complaint to determine whether or not a person has violated the Federal Power Act. Section 307(a) of the Federal Power Act [16 U.S.C. § 825f(a)]. Indeed, this is exactly what was done when the Tribe filed its Petition to Intervene

in 1971 in a licensing procedure wherein the Tribe complained that WWP had unlawfully constructed, operated and maintained the Little Falls Power Development and requesting that WWP be required to license the Little Falls Power Development.

If a complaint were to be filed by the Tribe, the Secretary of the Interior, or the FERC Staff based upon a United States District Court decision ruling that WWP does not have the lawful rights to construct, operate and maintain the Little Falls Power Development, what will be the reaction of WWP and FERC? WWP would argue that the FERC is barred by the doctrine of res judicata from requiring WWP to license the Little Falls Power Development. On the other hand, since the FERC went to extraordinary lengths in an attempt to exercise jurisdiction over the Little Falls Power Development in the earlier

proceeding that terminated in *WWP v. FERC*, it is conceivable that FERC may once again attempt to exercise jurisdiction over the Little Falls Power Development. Under the teachings of *Tacoma v. Taxpayers of Tacoma, supra,* parties that are before the FERC are only entitled to have licensing issues determined in one proceeding. Once that proceeding is final, the issues decided in that proceeding or that could have been decided in that proceeding are foreclosed from further litigation. *Tacoma v. Taxpayers of Tacoma, supra* at 339.

Assuming, *arguendo,* on remand the United States District Court reaches a different conclusion than the D.C. Circuit Court in *WWP v. FERC,* obviously WWP would appeal such decision to the Ninth Circuit Court of Appeals. If it is further assumed that the United States Court of Appeals affirms the United States District Court, obviously there will be a conflict between

the decision of the Ninth Circuit Court of Appeals and the decision of the D.C. Circuit Court of Appeals in *WWP v. FERC*. Where does that leave WWP? WWP would then be required to petition this United States Supreme Court, once again, for a writ of certiorari, asking this Court to resolve the conflict between the two opinions of the circuit courts which arise out of the same facts between the same parties concerning the same property.

Such possible conflict can and should be avoided by this Court issuing a writ of certiorari now rather than later. If a writ of certiorari is issued at this time and if the decision of the Ninth Circuit Court of Appeals is reversed, WWP, the Tribe, and the United States District Court will have avoided the expense and waste of judicial resources which will be involved in a re-trial of the issues

involving WWP's Little Falls Power Development property.

The Ninth Circuit Court's Memorandum Opinion Wastes Judicial Resources.

The D.C. Circuit Court decided in *WWP v. FERC* that WWP has the rights, title and interest necessary for the construction, operation and maintenance of the Little Falls Power Development. In doing so, the D.C. Circuit Court exhaustively examined the foundation of WWP's Little Falls Power Development rights and determined the extent and validity of those rights. The Tribe now wishes to relitigate WWP's rights and to have certain rights declared to be held by the Tribe. Such relitigation and determination will be futile.

The D.C. Circuit Court analyzed the Act of March 3, 1905 which provided for the acquisition of water rights and land for hydroelectric projects, such as the

Little Falls Power Development. The D.C. Circuit Court had, before it, all of the documentary evidence which showed that WWP had acquired the water rights and land rights for the Little Falls Power Development pursuant to the 1905 Act. WWP had paid all of the compensation which was provided in the 1905 Act. The Ninth Circuit Court, on the other hand, decided that *WWP v. FERC* did not establish "WWPC's *precise property interest* in the land under the Little Falls Dam." (Memorandum Opinion at p. 4, Appendix at p. 20a). Obviously, WWP contends that the Ninth Circuit plainly erred in such conclusion and apparently overlooked the conclusion of the D.C. Circuit Court that WWP holds "a limited fee with implied reverter for non-use." *WWP v. FERC, supra* at 325, Appendix at p. 679a. Assuming, *arguendo,* that the Tribe can establish that it has some reversionary interest in the Little

Falls Power Development lands, the establishment of such an interest by the Tribe will have no value to the Tribe. The Little Falls Power Development occupies such lands. The Little Falls Power Development is a very important hydro-electric resource to WWP, which is a public utility that serves electric power to hundreds of thousands of customers in Eastern Washington and Northern Idaho. WWP is prohibited, by law, from disposing of any utility property that is necessary or useful in performing the duties of the utility.[26] It is inconceivable that WWP or the Washington Utilities and Transportation Commission would ever approve of the disposal, sale or conveyance of the

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[26] RCW 80.12.020 provides that "no public service company shall sell, lease, assign or otherwise dispose of the whole or any part of its franchises, properties or facilities whatsoever, which are necessary or useful in the performance of the duties to the public ... without having secured from the [Washington Utilities and Transportation] Commission an order authorizing it so to do... ." RCW 80.12.020 (1991).

Little Falls Power Development. Indeed, the Little Falls Power Development has been dedicated to providing electric power to the public since 1910 when it was constructed and has been in continuous operation since that date. Therefore, the possibility of a reverter to the Tribe of the Little Falls Power Development lands for non-use has no value and is inconsequential as far as the dispute between WWP and the Tribe is concerned. Consequently, the Tribe will not be entitled to money even if WWP's "precise *property interests* in the land under Little Falls Dam" is established as a limited fee with implied reverter for non-use as stated in *WWP v. FERC,* in a proceeding before the United States

District Court for the Eastern District of Washington.[27]

In *United States v. Big Bend Transit Co.*, the court determined that Big Bend Transit Co. was entitled to "power site damages" in the condemnation action. *Id.* at 475. Obviously, both the D.C. Circuit

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[27] The United States District Court for the Eastern District of Washington is the same United States District Court that decided *United States v. Big Bend Transit Co.*, 42 F.Supp. 459 (E.D. Wash. 1941), which extensively analyzed the Act of March 3, 1905 (33 Stat. 1006) and the rights acquired under that Act and concluded that the rights acquired under that Act constitute a "limited fee with implied reverter for non-use." *United States v. Big Bend Transit Co.*, 42 F.Supp. 459, 472 (1941). It should be noted that *Big Bend Transit Co.* involved a condemnation case concerning a different power project where rights had been acquired under the Act of March 3, 1905, and where the project had never been constructed. The United States had commenced a condemnation action to acquire the power site lands from Big Bend Transit Co., which lands were to be used for the reservoir for the Grand Coulee Dam Project. The *Big Bend Transit Co.* Court reviewed a record that was substantially similar to the record that was before the FERC and the D.C. Circuit Court of Appeals in *WWP v. FERC*. The only difference being that the *Big Bend Transit Co.* litigation involved a different project at a different location on the Spokane River. As the *Big Bend Transit Co.* court noted, the Secretary of the Interior determined that the rights acquired under the 1905 Act constituted a limited fee with a possibility of reverter. *Id.*

Court of Appeals in *WWP v. FERC* and the United States District Court for the Eastern District of Washington in *U.S. v. Big Bend Transit Co.* determined that the respective power companies acquired the rights to construct, operate and maintain hydroelectric projects under the Act of March 3, 1905. What is left for the Tribe to obtain through litigation? How can the Tribe be entitled to compensation from WWP for rights that the United States Congress authorized the Secretary of the Interior to grant to WWP? How can the United States District Court provide relief for the Tribe from the decision that was made in *WWP v. FERC* or the decision that was earlier made by the Secretary of the Interior when the Secretary of the Interior memorialized the grant of lands and rights to WWP by an instrument dated July 2, 1924? (Appendix at p. 330a). The 1924 instrument, together with the entire

history that proceeded it, was before the FERC, was before the D.C. Circuit Court of Appeals, and was before the United States District Court for the Eastern District of Washington in this case below.[28] It is undisputed that WWP duly acquired the lands for the Little Falls Power Development by a grant from the Secretary of the Interior as authorized by the Act of March 3, 1905. It is undisputed that the Secretary of the Interior determined that WWP and its predecessor in interest "complied with all the rules and regulations promulgated by the Secretary of the Interior under said Act of March 3, 1905, and with all the provisions of said Act... ." (1924 grant, at p. 2, Appendix at p. 331a). What will be gained from requiring WWP to prove, once again, its

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[28] *See* the Affidavit of Jerry K. Boyd (Appendix at p. 129a). The 1924 instrument is set forth at Appendix at p. 330a.

property rights—or from allowing the Tribe to, once again, attempt to disprove WWP's property rights? Requiring WWP to incur the expense and vexation of such multiple litigation is inconsistent with the basic tenets of jurisprudence in the United States, which is that a party should only be subjected to only one litigation on an issue and should only be required to prove its rights or the merits of its case once and should not be subjected to multiple litigation with the risk that at some point in time some tribunal may reject that party's claim. *Montana v. United States, supra* at 153-154.

Incidentally, there are several factors in *Montana v. United States* that are analogous to this case, although the facts in this case are more persuasive than in *Montana v. United States*. In this case, the Tribe not only requested the FPC and FERC to adjudicate WWP's property

rights to determine whether or not WWP would be required to license the Little Falls Power Development, but the Tribe also participated as a full-fledged party, exercising all of its litigation rights. In *Montana v. United States*, the United States was not a direct party. The United States did not appear, present evidence, or otherwise directly participate in the earlier proceeding. In *WWP v. FERC,* the Spokane Tribe of Indians offered evidence, filed briefs, made arguments, and did all things that any party to litigation could or should do. WWP was required to respond to all of the allegations, evidence, and arguments made by the Tribe before the FERC and the United States Court of Appeals for the District of Columbia Circuit.

The Ninth Circuit Opinion Is Inconsistent With The D.C. Circuit Opinion.

In its Memorandum Opinion at p. 6 (Appendix at p. 13a), the Ninth Circuit made the following statement with respect to *WWP v. FERC*:

> "The only issue ever litigated during those [FERC and D.C. Circuit Court of Appeals] proceedings was whether WWPC had an interest, any interest, that would trigger the licensing exception in the Federal Power Act."

Such conclusion is not supported by a review of *WWP v. FERC* or the FERC opinions. (Appendix pp. 119a, 125a, 137a and 140a) Indeed, the D.C. Circuit Court of Appeals and the FERC all exhaustively reviewed the evidence before the FERC to determine whether or not there was any property interest which WWP did not have which would have been necessary for the construction, operation and maintenance of the Little Falls Power Development. If

there was any property interest that WWP did not have which was necessary for the Little Falls Power Development, undoubtedly the D.C. Circuit Court of Appeals would not have reversed the FERC and would have required licensing. *See, Montana Power Company v. Federal Power Commission*, 185 F.2d 491 (D.C. Cir. 1950).

The Ninth Circuit Court, in its Memorandum Opinion, totally misconstrued the Federal Power Act, particularly Section 23(b) [16 U.S.C.A. § 817]. Rather than determining if WWP had "any" interest in the disputed property, the real issue before the D.C. Court of Appeals in *WWP v. FERC* was whether or not WWP had "all" of the rights, title and interest necessary to construct, operate and maintain the Little Falls Power Development. Any defect in such interest would have subjected the Little Falls Power Development to the licensing jurisdiction of the FPC/FERC.

See Montana Power Company v. FPC, supra. Indeed, as is demonstrated in the FERC opinions, the FERC attempted to identify some defect in WWP's rights, title and interest so that FERC could exercise jurisdiction. As the D.C. Circuit Court determined in *WWP v. FERC*, no such defect exists. Now, the Tribe is seeking another opportunity to attempt to convince another judicial forum that such a defect exists, and the Ninth Circuit Court of Appeals is about to give the Spokane Tribe of Indians another chance to see if it can prevail.

CONCLUSION

For 14 years, the Spokane Tribe of Indians had a full and fair opportunity to challenge WWP's rights, title and interest to the Little Falls Power Development before the Federal Power Commission, the Federal Energy Regulatory Commission, and

finally the United States Court of Appeals for the District of Columbia Circuit. The final judicial decision in that effort was in favor of WWP. In *WWP v. FERC*, the United States Court of Appeals determined the precise legal rights of WWP as being "a limited fee with implied reverter for non-use, *See Big Bend Transit Co.*, 42 F.Supp. 459 (E.D. Wash. 1941) ...". The *WWP v. FERC* Court concluded that WWP has the rights, title and interest necessary to construct, operate and maintain the Little Falls Power Development. *Id.* at 336.

The United States District Court for the Eastern District of Washington reviewed the record that was before the FERC and that was before the court in *WWP v. FERC* and reviewed the affidavits before it and concluded that the claims made by the Tribe had been previously litigated and were barred by the doctrine of

collateral estoppel or issue preclusion, since the Tribe was a party in *WWP v. FERC*. The United States District Court for the Eastern District of Washington then dismissed the Tribe's complaint against WWP. On appeal, the Ninth Circuit Court of Appeals construed *WWP v. FERC* very narrowly and misconstrued the law applied by the *WWP v. FERC* court, and reversed and remanded the matter for further trial to determine WWP's "precise legal title".

WWP has been required to defend its legal rights to the Little Falls Power Development property for more than 20 years against claims being made by the Tribe. The costs of such defense have been tremendous. WWP prevailed in 1985 in *WWP v. FERC*. The Tribe should not be permitted to relitigate the issues that were raised before the FERC and in the D.C. Circuit Court of Appeals and were decided. *Tacoma v. Taxpayers of Tacoma, supra* at 336-341.

The Tribe should not be permitted to collaterally attack the decision of the United States Court of Appeals in *WWP v. FERC*. *Id*. at 341. Congress provided the exclusive means by which to review the decisions of the FERC under the Federal Power Act, Section 313(b) of the Act [16 U.S.C. § 8251]. *Tacoma v. Taxpayers of Tacoma, supra*, at 339 and 341. It would be unjust and unfair to WWP to require WWP to relitigate its property rights, and would be inconsistent with the precept that after the parties have had a full and fair opportunity to litigate issues, the final decision in that litigation should be determinative and final. *Montana v. United States, supra* at 153-154.

Based on the foregoing reasons, The Washington Water Power Company respectfully requests that this Court issue a Writ of Certiorari to the Ninth Circuit Court of Appeals to review the Memorandum

Opinion of the Ninth Circuit Court of Appeals issued on March 12, 1992.

DATED this 24th day of September, 1992.

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